

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO**

In re:)	
)	Bankruptcy Case No. 02-21057-DEC
BABAK SOUFIANI,)	
SSN: 523-51-6605)	Chapter 7
Debtor.)	
_____)	
)	
MARIA HAJIAGHAEI,)	
)	
Plaintiff,)	
)	
v.)	Adversary Proceeding No. 02-1522 HRT
)	
BABAK SOUFIANI,)	
)	
Defendant.)	
_____)	

ORDER REGARDING ADVERSARY PROCEEDING

THIS MATTER comes before the Court as a result of a Complaint to Determine Dischargeability of Debt pursuant to 11 U.S.C. § 523(a)(15) filed by Maria Hajiaghaei, the Debtor's ex-spouse.

The Court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334; and this is a core proceeding as listed in 28 U.S.C. § 157(b)(2)(I).

FINDINGS

At the beginning of the hearing, the parties stipulated to certain undisputed facts:

1. The Adams County District Court (the "Divorce Court") is the court of record for all proceedings related to the dissolution of this marriage.
2. The marriage between the Debtor and the Plaintiff was dissolved by Order of the Divorce Court on September 13, 2001.
3. Permanent Orders were entered in connection with the dissolution on October 19, 2001, after a trial to the Divorce Court on the issues of child support, alimony and property division.

4. The Debtor has been making payments on the second mortgage on the marital home through his business, Champion Auto Body and Paint.

5. On July 19, 2002, the Debtor filed his petition under Chapter 7 of the U.S. Bankruptcy Code.

At issue is whether the Debtor may discharge certain obligations required under the Permanent Orders, namely,

(1) Whether the Debtor must continue to pay the second mortgage on the marital property, commonly known as 363 Melody Drive in Northglenn, Colorado, which was conveyed to the Plaintiff in the divorce, and as to which the Debtor was ordered to hold the Plaintiff harmless regarding said obligation.

(2) Whether the Debtor must pay the remaining \$2,500.00 of the \$5,000.00 in Plaintiff's attorneys fees that the Divorce Court ordered the Debtor to pay.

The parties have agreed that the issues in dispute are whether (1) the Debtor has the ability to pay these obligations or (2) if the benefit of a discharge to the Debtor would outweigh the detrimental consequences to the Plaintiff by such discharge as provided in 11 U.S.C. § 523(a)(15)(A) and (B) respectively. The Permanent Orders were entered into evidence by agreement of the parties.

In a typical dischargeability proceeding, the Plaintiff would bear the burden of proving her case by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991). However, when proceeding under § 523(a)(15), there is a "rebuttable" presumption that any property settlement obligation arising from a divorce is nondischargeable unless the debtor can prove one of the two elements set forth in § 523(a)(15)(A) or (B).

Under 11 U.S.C. § 523(a)(15), the Plaintiff has the initial burden of establishing that the debts at issue are within the purview of § 523(a)(15). That burden has been satisfied because the Debtor does not dispute that the debts come within the meaning of § 523(a)(15), but argues that the exceptions in § 523(a)(15)(A) or (B) apply.

The majority of courts have held that the Debtor has the burden of proof as to § 523 subsections (A) and (B). See *In re Johnson*, 212 B.R. 662 (Bankr. D. Ks 1997); *In re Jodoin*, 209 B.R. 132 (9th Cir. BAP 1997) (citations omitted). Once the Debtor has shown the benefit of a discharge under § 523(a)(15)(B), the nondebtor spouse has the burden of production with regard to the detrimental consequences to the nondebtor spouse. See *In re Henson*, 190 B.R. 229 (Bankr D. Md 1995). The

ultimate burden, however, lies with the Debtor because § 523(a)(15)(B), like subsection A, is an affirmative defense. See *In re Hill*, 184 B.R. 750 (Bankr. N.D. Ill. 1995). The appropriate time to apply the ability to pay and the benefits/detriments test is at the time of trial and not at the time of the petition. See *In re Jodoin*, 209 B.R. 132 (9th Cir. BAP 1997).

Section 523(a)(15)(A) requires a showing by the Debtor that he does not have the ability to pay the debt at issue. The Court agrees with the *In re Hill* case where the court utilized the disposable income test of 11 U.S.C. § 1325(b)(2) to aid the Court in determining whether the Debtor has the ability to pay. The statutory language and principle of § 523(a)(15)(A) is virtually identical to that contained in § 1325(b)(2)(A) and (B). This “ability to pay” test focuses on whether the Debtor’s budgeted expenses are reasonably necessary.

The Court finds that the Debtor has not met his burden as to § 523(a)(15)(A). Indeed, the Debtor’s evidence in this area is murky, at best. In almost all cases reviewed by the Court, the evidence presented involved the submission of financial statements such as tax returns, bank account statements, and itemizations of revenue and expenses. Nothing, or precious little, of this is present in this record.

The Debtor has not provided the Court with any budget of monthly revenues and expenses. On cross-examination, the Debtor testified that he is living with relatives and is sharing expenses. The Court has no information on what debts have been discharged or what other debts the Debtor is currently paying.

The Debtor testified that Key Bank, N.A., the creditor holding the secured loans against his business and the second mortgage involved here, has sold the business assets serving as collateral and applied them to the business loan, not against the mortgage. The Debtor said he is currently out of work. However, he also testified that he is working to finish up cars in the shop by the end of the month. He is not currently seeking other employment.

In a way, the Debtor’s diligence in continuing to pay on the two debts owed here has demonstrated that he can pay the debt. As of trial, the Debtor has paid down the second mortgage from approximately \$27,000 owed at the time of his bankruptcy filing to approximately \$7,500.00 now.

The Debtor failed to establish that he lacked the ability to pay the approximately \$10,000.00 remaining on the second mortgage and the unpaid balance of his attorney fee obligations. However, this conclusion does not end the inquiry though, as the obligation may still be dischargeable if the Court finds such discharge is more beneficial to Debtor/Defendant than it is detrimental to Plaintiff.

The Court does not find that the Debtor has been able to meet his burden under

§ 523(a)(15)(B). Courts examining § 523(a)(15)(B), in balancing the financial equities among the Debtor and the nondebtor spouse, have weighed several factors and applied a totality of the circumstances test. Those factors applied to this case are:

1. The income and expense of both parties.
2. Whether the nondebtor spouse is jointly liable on the debts.
3. The number of dependents.
4. The nature of the debt.
5. The reaffirmation of any debts.
6. The nondebtor spouse's ability to pay.

The evidence presented by the Debtor on these issues was inadequate and somewhat contradictory. Most of his statements to the Court concerning his current situation were conclusory. No corroborative evidence, by way of relevant, specific documents or explanatory testimony, was submitted. The most recent evidence before the Court concerning revenue and expense matters is the Debtor's representation to the Divorce Court that his three businesses have failed and he can make \$2,500.00 per month.

As stated, the Debtor has presented little information regarding his financial status. The bank has foreclosed his business, yet he continues to repair cars. He lives with relatives, but no information regarding his monthly expenses was provided. Large tax obligations and medical bills were mentioned in passing, but no supporting details regarding their current status were provided.

The nondebtor spouse is jointly liable for the attorneys fees the Divorce Court ordered the Debtor to pay and has made periodic payments to her counsel for which she expects to be reimbursed by Debtor. The couple had one daughter and the Debtor pays child support as required by the Divorce Court.

The second mortgage results from a loan the Debtor obtained from Key Bank for his business. A promissory note, in the original principal amount of \$85,000.00, was entered into evidence showing Champion Auto Body & Paint, Inc. as the borrower. It appears that the proceeds were used in the business and thus benefitted an asset which the Debtor retained from the divorce.

No information was provided as to the reaffirmation of any debts.

The nondebtor spouse presented evidence that, although she presently may be in somewhat of a more favorable position than the Debtor, from her ability to utilize the assets received from the divorce to better her situation, it is apparent she is struggling to pay her attorneys fees and thus needs reimbursement from the Debtor. The house subject to the second mortgage is rented for the amount that covers the first mortgage. Whether she could rent it for an amount that would cover the second mortgage as well, to first preserve that asset and then seek payment from the Debtor over time, would only be conjecture by the Court.

Balancing the benefit to Debtor and detriment to wife is a close call. Insufficient evidence was provided with respect to the Debtor's financial status and standard of living for the Court to make any determination that, under the balancing test, the debts at issue should be discharged. A comparison of both parties standards of living shows they are struggling to get by and pay bills. As in many divorce cases, there is no clear "economic winner" on which the Court could base a decision.

Another issue the Court must consider is whether part of the debt can be excepted from the discharge. Most courts follow an "all or nothing" approach. See *In re Taylor*, 191 B.R. 760 (Bankr. N.D. Ill. 1996), aff'd 199 B.R. 37 (N.D. Ill. 1996). The phrase "to the extent that" does not appear in § 523(a)(15) as it does in certain other sections of the Bankruptcy Code. Courts have interpreted this omission as Congress' intent to limit the courts to an "all or nothing" result with no discretion to further adjust the rights and liabilities between the parties. The Bankruptcy Court cannot sit as a super-divorce court to determine the most reasonable level of support or payment. Therefore, this Court is limited to discharging or not discharging all of the remaining second mortgage and attorney fee balances.

The ultimate burden of proof regarding the balancing test is on the Debtor and the Court finds it has not been met here. Therefore, the Court

ORDERS that the unpaid, outstanding balances on the Debtor's obligation to pay the second mortgage and on the Plaintiff's attorneys fees are not discharged.

FURTHER ORDERS that within five (5) business days Plaintiff's counsel shall submit a form of Non-dischargeable Judgment in the amount owed as of the date of trial for entry by the Court.

DATED this 4th day of August, 2003.

BY THE COURT:

Howard R. Tallman, Judge
United States Bankruptcy Court

